

LAVERNE BOLLING)	
Claimant)	
)	
VS.)	
)	
UNITED WAY OF THE PLAINS)	
Respondent)	Docket No. 1,019,460
)	
AND)	
)	
EMCASCO INSURANCE COMPANY)	
Insurance Carrier)	

¹ Order (Dec. 3, 2004).

Instead, respondent points to claimant's prior January 2004 slip and fall as the probable cause of her low back condition and need for surgery. Respondent further denies receiving timely notice of the alleged accident at work.

Conversely, claimant argues that her accident at work either caused or aggravated her low back condition and that she gave timely notice thereof. Claimant contends the ALJ's Order should be affirmed.

Accordingly, the issues for the Board's review are whether claimant has proven personal injury by accident arising out of and in the course of her employment and, if so, whether she gave respondent timely notice of her accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."³

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of employment.⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the fact peculiar to the particular case.⁵

Claimant had a preexisting back condition from an earlier accident not related to her work with respondent. Nevertheless, she alleges that she aggravated her preexisting condition lifting boxes at work on August 6, 2004. She has been unable to work since that date.

It is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the

² K.S.A. 44-510(a); *See also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

³ K.S.A. 44-508(g); *See also in re Estate of Robinson* 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

⁵ *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

affliction.⁶ "The test is not whether the job-related activity or injury caused the condition but whether the job related activity or injury aggravated or accelerated the condition."⁷

Claimant acknowledged having a preexisting back and left leg condition, but said the problem was in her upper back, not lower back.

Q. (Ms. Franklin) Ms. Bolling, you heard the statements that were made before you started testimony here today. Is it true that you have actually had a back injury and a left leg injury prior to the accident being claimed on the claim today of 8-6-04?

A. (Ms. Bolling) On January 31, '04 I had a fall. I broke two ribs on my left side, I hit my head. I was having neck and back problems at that time. Not lower back but upper back. I received physical therapy for those.

Q. And at some point during that treatment you also had some symptoms down into your left leg, is that correct?

A. Intermittent, yes.

Q. And as indicated, that slip and fall was not work related from January 31 of 2004.

A. No, it was not.

Q. And did you end up missing work from that injury?

A. I did. I missed work February, March. I returned to work part time April and part of May. And on May 24 my doctor released me to return full time to employment at United Way.

Q. When did you return to full-time employment with the United Way?

A. May 24 of '04.

Q. At that point in time were you still having problems with your back and left leg?

⁶ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gary & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

A. At that time it wasn't problems with my back or my left leg, it was problems with my neck area. . . .⁸

In July of 2004 claimant said she "began to feel a weakness in her lower back"⁹ and sought additional treatment from her chiropractor, Dr. Jennifer D. Peterson. She referred claimant to a neurosurgeon, John P. Gorecki, M.D. This resulted in an MRI and a recommendation for epidural injections.

Claimant testified that she left her office about 3:30 p.m. on August 6, 2004, and was delivering four boxes of materials to Wichita State University believing this to be her last appointment of the day. Claimant described the incident as follows:

A. (Ms. Bolling) On August 6, it was a usual day. I had to take material, my last stop of the day was to Wichita State University. That was the largest amount of material that I have had to take since I returned to work. My son weighed one of the boxes and I had four boxes. One of the boxes weighed between 25 and 27 pounds. I took them from my office, loaded it into a roller, took it to the front desk, left it, brought my car over, took the material out of the rolling cart, placed it into my car. The last box I had difficulty taking out and there was a lady coming into the building and she helped me take it out. And I couldn't understand why, I couldn't get a grasp on it. I got into the car, I was perspiring profusely; and I am thinking, today was warm, I just continued. I got over to WSU and I drove there and I was not able to get out of the car. . . .¹⁰

Claimant was taken to the Cypress Surgery Center where she received the epidural injection that had previously been scheduled by Dr. Gorecki for that same day.

Claimant testified that she reported this incident to her supervisor, Kandi LaMar, but has never received workers compensation benefits. Ms. LaMar testified that she was aware of claimant's condition, but was unaware of any allegation that it was work-related before receiving a letter from claimant's attorney shortly after October 4, 2004.¹¹ Claimant's absence was treated as sick leave which was likewise consistent with the history claimant was giving her treating physicians. It was not until September 10, 2004, before there is any mention of an August 6, 2004 accident in any of the medical treatment records.

⁸ P.H. Trans. at 10 and 11.

⁹ *Id.* at 12.

¹⁰ *Id.* at 14.

¹¹ P.A. Trans. at 57.

Claimant acknowledges seeing Dr. Peterson on July 30 because of low back pain. Claimant said that Dr. Peterson was “very concerned about the lower back area”¹² which resulted in the referral to a neurosurgeon, an MRI and being scheduled for an epidural injection on August 6, 2004. Although that epidural had already been scheduled before claimant’s alleged work-related worsening, it was not actually performed until after the incident at Wichita State University on the afternoon of August 6, 2004. Claimant did undergo that course of treatment but her symptoms did not improve. The recommendation now is that she undergo low back surgery.

Although claimant testified that her problems following the January 31, 2004 slip and fall were in her neck, upper back and ribs, the treatment records also refer to low back pain radiating to the left hip and down her left leg. These low back and left leg complaints appear again in Dr. Peterson’s treatment records of July 29 and August 3, 2004. In fact, on August 3, 2004, claimant described having severe pain in her left leg that she rated as an eight (8) on a scale of 1-10. Claimant also related having bowel and bladder problems associated with her low back pain. Dr. Peterson suspected a herniated disk at that time and therefore referred claimant to a neurosurgeon.

Claimant first saw Dr. Gorecki on August 4, 2004, and again at noon on August 6, 2004, which would have been just hours before the alleged accident later that same day. Dr. Gorecki’s records contain a history of significant, constant, spontaneous, sharp low back pain since a fall on ice six (6) months earlier. Claimant described her pain level at noon on August 6, 2004, to Dr. Gorecki as a nine (9) on a scale of 1 to 10. Dr. Gorecki noted that claimant was walking stiff leg, that she was uncomfortable sitting down and that she could not raise her left leg due to stiffness. He reported claimant having “incapacitating pain.”¹³ Dr. Gorecki scheduled claimant to have an epidural injection by Dr. Kent Cooper at 4:45 p.m later that same day, August 6, 2004. Dr. Cooper’s August 6, 2004 record indicates that claimant presented with a “two-week exacerbation what previously presented as a left posterior gluteal, posterior thigh, and calf pain with pain extending distally and into the lateral aspect of the left foot.”¹⁴ Claimant said that she did not report the injury at work to Dr. Cooper because “I did not realize that that was why I was having that type pain at that time.”¹⁵ Claimant said she did not make a connection between moving the boxes and the increase in her symptoms.

¹² *Id.* at 27.

¹³ *Id.* at 40.

¹⁴ P.H. Trans. at Cl. Ex. 1 and P.H. Trans. at 41.

¹⁵ *Id.* at 41 and 42.

On August 5, 2004, claimant returned to Dr. Peterson. At that time she had an altered gait which Dr. Peterson described as hobbling due to her low back and left leg pain. Claimant also saw Dr. Peterson on August 16, 17, 18, 19, 20, 23, 24, 26, 27, 30, September 1, 2, 7, 9, 10, 13, 15 and 20. On none of those occasions did claimant mention being injured at work on August 6, 2004.

On August 10, 2004, claimant presented to the Wesley Medical Center emergency room in Wichita, Kansas. As claimant had previously been told that if the epidural injections did not relieve her pain she was to report to the emergency room for treatment. Claimant was seen by the attending physician, Mark L. Mosley, M.D., who was told claimant's onset of pain was last December when claimant had an accidental fall. Dr. Mosley recorded there were no bilateral symptoms and noted her vital signs were normal. Claimant described her pain at that time as a twenty (20) on a scale of 1-10. Dr. Mosley prescribed pain medications and also arranged for long-term medications. He also started claimant on Neurontin for her neuropathy and placed her on a course of short-term steroids. He diagnosed claimant with back pain and recommended claimant followup with her neurosurgeon first thing in the morning.

Claimant called Dr. Gorecki's office on August 11, 2004 with complaints of severe pain increasing after she had an epidural injection. Claimant also reported increased pain with walking. At that time Dr. Gorecki instructed claimant to call Dr. Cooper and to go to the emergency room if the pain continued.

On August 25, 2004, claimant was examined again by Dr. Gorecki. At that time claimant's primary complaint was left leg pain. Dr. Gorecki noted claimant's fall on ice in January 2004 and since that time claimant described constant pain in her left hip. The pain was brought on by weight bearing in her left leg. Claimant also described experiencing a constant stocking glove numbness in her left lower extremity. The MRI of claimant's lumbar spine revealed a disc desiccation throughout with narrowing of the disc at L5-S1. Claimant's nerve conduction and EMG studies were negative. Dr. Gorecki also noted that neither claimant's physical therapy nor her epidural steroid injections provided any relief. Claimant's pain score was a 20 on a scale of 1-10. Dr. Gorecki recommended a lumbar CT myelogram to look at the lumbosacral plexus however, claimant chose to wait and wanted to see Drs. Cusick, Murati and Abbas. Dr. Gorecki's chart note does not reflect if claimant was supposed to followup after this date.

On September 29, 2004, claimant was examined by Earl C. Mills, M.D., at the Wichita Clinic, P.A., in Wichita, Kansas. At that time claimant had complaints of severe low back pain with radiating pain into the left buttock and into her left posterior thigh and leg with numbness of her left foot. Dr. Mills examined claimant at the request of Dr. Schultz and Dr. Porter. Claimant described for Dr. Mills her January 1, 2004, slip and fall accident on an icy area, striking the ground with her left buttock and experiencing pain in her left hip. Claimant then went on to report to Dr. Mills how on August 6, 2004, while lifting materials into her car she felt immediate twinges in her left buttock area. Eventually,

the pain continued to worsen and claimant was given two lumbar epidural injections with no success. Claimant had utilized a TENS unit from August 6, 2004 to when she presented to Dr. Mills on September 29, 2004. Claimant on this day described her pain as a ten (10) on a scale of 1-10. Dr. Mills diagnosed claimant with severe low back pain syndrome, left lower extremity radiculopathy grade one (1) spondylolisthesis minimal at L4-5 and suspected early spinal stenosis. Dr. Mills noted claimant's MRI reflected some degree of canal compromise at L4-5 and L5-S1 with a grade one (1) slip. He referred claimant for a myelogram of her lumbar spine, evaluating from T10 to the sacrum with post myelographic CT scan. Following the recommended testing Dr. Mills wanted to re-evaluate claimant and noted that she may eventually require a diskogram.

Claimant's supervisor, Kandi LaMar, testified that she had observed claimant before August 6, 2004, and that during the days shortly before August 6, 2004, claimant appeared to be in quite a bit of pain.

Q. (Mr. Laskowski) Did you observe anything with respect to Ms. Bolling's medical condition at that time?

A. (Ms. LaMar) She seemed to be in quite a bit of pain particularly on the afternoon of August 5 after our training seminar at the Hyatt.

Q. And you say she appeared to be in quite a bit of pain. What led you to reach that conclusion?

A. She could - - she was not walking very well.

Q. Was she having any difficulty standing or sitting?

A. On Tuesday at our regular staff meeting, in my office, she elected to stand during the meeting because she was having difficulty sitting for that long of a period of time.¹⁶

Ms. LaMar further testified that when she spoke with claimant by telephone on the morning of August 9, there was no mention of a work-related injury. It was Ms. LaMar's understanding that this was a personal medical condition most likely related to her January 2004 slip and fall injury which had previously caused claimant to miss a considerable amount of work. The e-mails that Ms. LaMar sent to the personnel office concerning her conversations with claimant support Ms. LaMar's contention that she was unaware of any work-related connection to claimant's injury.¹⁷

¹⁶ *Id.* at 58.

¹⁷ *Id.* at Resp. Ex. 1 and 2.

Based upon the testimony and the evidence presented to date, in particular the medical treatment records, the Board finds that claimant has failed to prove a causal connection between her present symptoms and need for treatment, including surgery, and an accident at work on August 6, 2004. Consequently, the Board concludes claimant has failed to prove that she suffered an accidental injury arising out of and in course of her employment with respondent.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated December 3, 2004, is reversed.

IT IS SO ORDERED.

Dated this _____ day of April, 2005.

BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
 Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
 John D. Clark, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director